Czechs and Balances – One Year Later

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The Czech Republic entered into its first COVID-related state of emergency on 12 March 2020. A year has passed – of which the country spent 225 days in a state of emergency and 140 days in an emergency-free 'summer break'. During the past year, the country has had three ministers of health, four states of emergency (one of them unconstitutional), several judicial interventions, and a brand-new Pandemic Act which should be triggered as soon as the state of emergency comes to an end.

As a preliminary point, it should be pointed out that the government has been ruling without majority support in the Chamber of Deputies ('Chamber', the lower house of Parliament). The country is thus governed by executive measures rather than legislative acts, which may be seen as problematic in a parliamentary democracy, especially if this state persists for a number of months, rather than just for a short period of emergency. In the early stages of the pandemic, executive aggrandizement was justified by the need for efficiency and promptness. One year later, reasonable suspicion is well-founded.

This blogpost analyses the Czech situation from the perspective of the rule of law requirements and identifies two main deficiencies: a significant and long-lasting shift of power to the executive, and an ostentatious lack of reasoning of the executive crisis measures. Fortunately, these 'two tales of executive arrogance' have been somewhat counterweighed by the legislature and the judiciary.

First, the successive declarations of states of emergency have received hesitant support from the Chamber, often in exchange for political promises which remained unfulfilled. At some point, the Chamber refused to consent to another extension of the state of emergency. When the government declared a new state of emergency nevertheless, the Chamber annulled it.

Second, in its executive rulemaking, the executive has not bothered to accompany its measures with persuasive (or any) justification. This could not happen if the measures were legislative. This lack of reasoning has been criticised by courts. After a hesitant take-off, the judiciary seems to have finally assumed its role as an overseer of the executive's actions.

Who Does What? – A Quick Revision

In my previous blogpost, I introduced the two types of executive measures. Government crisis measures are adopted as 'other legal acts' reviewable by the Constitutional Court on the proposal of privileged applicants only. They are issued pursuant to the Crisis Management Act ('CMA') and require a state of emergency. Measures adopted by the Ministry of Health (or other authorities, e.g. regional health stations) are 'hybrid measures' challengeable by individuals and reviewable

by administrative courts. They are issued pursuant to the Act on the Protection of Public Health ('APPH') and do not require a state of emergency. Can we say that 'under normal circumstances' public health crises are handled by the Ministry of Health but once a state of emergency is declared, the government takes over? The Municipal Court in Prague thought so (judgment of 23 April 2020) but the Supreme Administrative Court disagreed (judgment of 26 February 2021) as there is no legal basis for such primacy of government measures in a state of emergency. Thus, it seems that the government and the Ministry can act in parallel, producing two types of measures reviewable in different procedures. Furthermore, the new Pandemic Act foresees a new type of measures, issued by the Ministry of Health or by a regional health station, after obtaining consent from the government. These measures will be reviewable in administrative judiciary (§ 13).

The First Tale of Executive Arrogance: Successive States of Emergency

The first state of emergency had its own blogpost. On 30 September 2020, the government declared **a second state of emergency** which began on 5 October and was extended five times, always with a prior consent of the Chamber. Without a stable majority in the Parliament, the minority government always struggled to find support for another extension and had to offer favours in return. Interestingly, the government always asked for an extension of 30 days but the Chamber usually granted a shorter period – which is both politically significant and procedurally problematic.

When the government asked the Chamber to consent to a sixth extension of the state of emergency on 11 February 2021, the Chamber refused. By then, not only had the government obviously failed to handle the pandemic but it also failed to present any plausible strategy for the future. It had also ignored the opposition's attempts to discuss alternative options, such as the adoption of a Pandemic Act which would allow to handle the situation without the need for a state of emergency.

Without parliamentary consent for further extension, the state of emergency ended on 14 February.


State of Emergency #1
began 12 March 2020
(for 30 days)
extended 9 Apr 2020
(until 30 Apr 2020)
extended 30 Apr 2020
(until 17 May 2020)
ended 17 May 2020
no emergency
from 18 May 2020
to 4 October 2020

The government, however, was determined to keep the country in a state of emergency to retain its aggrandised executive powers following therefrom. A loophole was found: pursuant to Article 3(5) of the CMA, heads of regional governments can ask the government, under certain conditions, to declare a state of emergency. After an intense (Sun)day of negotiations on the last day of the state of emergency, all 14 heads of regional governments agreed to the dubious plan and on 14 February 2021 the government declared, upon request of the heads of regional governments, a (third) state of emergency that began on 15 February, immediately after the previous one.

This loophole, however, was unconstitutional.

The CMA indeed empowers the heads of regional governments to ask the government to declare a state of emergency. The government, however, cannot do so without limits. From the perspective of the constitutional order, it remains irrelevant whether the government acts of its own motion or upon request by the heads of regional governments. The government may declare a state of emergency for a period of maximum 30 days; any extension requires a prior consent of the Chamber. In this case, the state of emergency had been extended five times, had lasted for 133 days, the Chamber had explicitly refused another extension and the state of emergency ended on 14 February. The government's declaration of the third state of emergency was thus an obvious circumvention of the constitutional limits of its powers. (The Constitutional Court later confirmed this in its decision Pl. ÚS 12/21 where it stated, *obiter dictum*, that if the CAS provides that the government may declare a state of emergency for a period of 30 days and that this period may be extended only after the Chamber consents to it, it is not possible to extend the state of emergency in another way. Unless there is a change in relevant circumstances, it is not possible to declare a "new" state of emergency if the "original" state of emergency has come to an end and the Chamber has not consented to its extension.) On 18 February, the Chamber annulled this dubiously declared state of emergency with effect from the day of entry into force of the anticipated Pandemic Act but at latest on 27 February (which happened to be the day when the Pandemic Act entered into force). In the meantime, on 23 February 2021, the Municipal Court in Prague ruled in favour of a teenage applicant who challenged his school's online courses and asked for offline education instead. This administrative court's ruling stemmed from the unconstitutionality of the government's actions. After the government had declared the third state of emergency, it issued follow-up crisis measures, including the one which demanded that schools keep their premises closed and continue teaching their courses online. The precondition of this crisis measure, however, was a state of emergency declared pursuant to the constitutional requirements. The court argued:

> '*With regard to the immediate follow-up of the [present] state of emergency after the [previous] state of emergency, and given that the reasons for the declaration of both states of emergency are formulated utterly identically […], the court has concluded that* ***the [present] state of emergency is not a new state of emergency but rather a de facto continuation of***

> ***the [previous] state of emergency, declared against the will of the Chamber of Deputies which has not consented to the extension*** *of the previous state of emergency, as required by Art. 6(2) of the CAS. […] With regard to this, the continuation of the state of emergency after 15 February 2021 contravenes the constitutional order.*'

(This first-instance judgment was immediately challenged before the Supreme Administrative Court by the defendant school which also applied for an interim measure. This interim measure was granted and the school did not have to open its gates in the peak of the pandemic. The decision of the Supreme Administrative Court on the merits of the case is pending.)

On 24 February, the government made an unprecedented request: it asked the Chamber for an extension of the third state of emergency, and requested that the Chamber revoke its decision by which it annulled that state of emergency. The Chamber discussed this request on 26 February and – unsurprisingly – did not meet the government's wishes.

On the same day, the Parliament adopted the long-awaited Pandemic Act effective from 27 February 2021. Its main purpose is to enable the country to deal with the COVID-pandemic without a state of emergency. However, due to an adverse aggravation of the epidemic situation (new mutations, record numbers, etc.), the government persuaded the Chamber that it needed another state of emergency which would enable it to adopt radical measures for a period of three weeks, including a severe restriction of mobility on the territory. Therefore, upon explicit invitation by the Chamber, the government declared a (fourth) state of emergency, foreseen to last from 27 February to 28 March 2021. This fourth state of emergency was extended again on 26 March and is foreseen to last until 11 April.

The Second Tale of Executive Arrogance: Unreasoned Executive Measures

During a significant majority of the past year, the executive enjoyed its aggrandised powers subject to a very limited scrutiny not only by the legislative branch but also by the judiciary. Looking back at the previous year, the courts have not yet annulled a measure for substantive reasons; all the annulled measures were unlawful due to lack of reasoning. Let's consider 3 representative examples.

On 20 October 2020, the Municipal Court in Prague declared unlawful the closure of universities by the Prague hygiene station. Although the challenged executive measure included a detailed description of the deteriorating epidemic situation in Prague and clearly formulated the legitimate aim to slow down the spread of the virus, it failed to explain why universities needed to be closed while kindergartens, primary and secondary schools, but also restaurants and bars remained open. (Yet, all universities remained closed nevertheless.)

On 13 November 2020, the Municipal Court in Prague declared unlawful the measures of the Ministry of Health on the obligation to wear face masks. The court

emphasised it did not consider the measure disproportionate, nor were the judges opposed in principle to a rule commanding people to wear face masks. However, the challenged measure could not be subjected to judicial review because it lacked any meaningful justification. The Ministry had toughened the measures while repeating the same justification: that face masks were more important indoors than in the open air. Such a justification, however, could not explain the obligation to wear a face mask while standing at a bus stop or walking in the streets, which is exactly what the Ministry measures required. (Just like with universities, the measure was replaced by another one and the obligation to wear masks remained in effect.)

The carelessness in offering justification for crisis measures led to the first (and so far only) decision of the Czech Constitutional Court on the merits of the COVID crisis. After many self-restrained rulings in which it refused to go into the heart of the matter, the Court finally issued a ruling (published on 22 February 2021) by which it annulled the government's crisis measures for their absolute lack of justification. According to the Constitutional Court, '*in a state governed by the rule of law, it is unthinkable that any act issued by a public institution and capable of restricting fundamental rights would not be rationally and persuasively reasoned, or that its reasoning would not be available at least in the course of the subsequent judicial review.*'

In the past couple of weeks, following the Constitutional Court's ruling, the executive bodies seem to have learned a lesson and they have shown attempts to justify their measures. It remains to be seen whether the judicial intervention will bear fruit in a long-term perspective.

Conclusion and Outlook

From the rule of law perspective, the two tales of executive arrogance are worrying, especially in their combination. Luckily, the legislature has (hopefully) managed to curtail the executive by adopting the Pandemic Act and the judiciary has finally shown its willingness to annul executive measures if they are not reasoned.

In his (offline!) lecture of 14 December 2020, Jan Wintr analysed the executive crisis measures from the perspective of Lon Fuller's principles of the 'inner morality of law', i.e. the eight requirements that rules should be general, promulgated, prospective, clear, non-contradictory, not impossible, constant, and appropriately enforced; concluding that the Czech executive managed to breach all eight principles. In fact, one could suspect that the government's lawyers made a bet whether it was possible to breach all eight Fuller's principles at once. While some of these failures may be justified by the extraordinary situation, one of them cannot: an absolute lack of reasoning of the measures.

Justification of adopted measures is one of the fundamental requirements of the rule of law; it allows the addressees of a measure to comprehend its purpose, prevents arbitrariness in decision-making, and makes judicial review possible. Unreasoned rules imply indifference, detachment, or arbitrariness of those at power.

For the remainder of 2021, Czech citizens should hope for a better political culture of justifying the crisis measures, for a well-functioning crisis management under the new Pandemic Act, for an effective vaccination policy, and for no further political and constitutional complications on our road to the (endangered?) elections in October 2021.

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